A

RIKKY PURBA

v.

PP

B

COURT OF APPEAL, PUTRAJAYA
RAMLY ALI JCA
ABDUL AZIZ RAHIM JCA
MOHD ZAWAWI SALLEH JCA
[CRIMINAL APPEAL NO: Q-05-262-09-2011]

C

13 JANUARY 2014

CRIMINAL PROCEDURE: *Murder - Provocation - Whether accused provoked to lose self-control - Relevant consideration - Whether accused's failure to put defence of provocation to prosecution's witnesses excusable -*

D *Whether prosecution obliged to explain injuries sustained by accused to support defence of self-defence - Whether obligation on accused to question prosecution witnesses about injuries*

CRIMINAL LAW: *Murder - Defence - Provocation - Relevant*

E *consideration - Nature of provocation, reaction by parties, lapse of time, relationship of parties, sensitivity of parties - Whether deceased initiated provocation - Failure to put defence to prosecution witnesses - Whether defence ought to be rejected*

EVIDENCE: *Witness - Interested witness - Witness was wife of*

F *deceased - Whether witness deposed in favour of deceased - Whether evidence tainted or rested on any basis of fact - Whether testimony to be treated with caution*

The appellant was convicted and sentenced to death by the High

G Court for murdering a man ('the deceased') during a fight. He was sentenced to six months' jail on another charge of voluntarily causing hurt to the deceased's wife ('PW12') with a dangerous weapon. The prosecution's evidence rested largely on PW12's testimony. She said that after she and the deceased had taken

H their bath and were in their room, the appellant suddenly entered the room and began to repeatedly stab the deceased, who was then unarmed, with two knives. PW12 said that when she tried to get hold of a mobile phone, the appellant stabbed her on her hand and when she ran to the kitchen to get a hammer, the

I appellant followed and stabbed her on her thigh. She fell and

screamed. The deceased tried to help her after arming himself with a parang but he collapsed. The deceased had 28 injuries on his body but a stab wound that pierced his heart caused his death. The appellant's defence was one of provocation and self-defence. He said that he was in the bathroom when the deceased told him to hurry up as he, too, wanted to bathe. When the appellant told him to be patient, the deceased insulted him, by calling him a dog, and when asked the reason for the insult the deceased punched him in the face. The appellant said he first went back to his room but thereafter went to ask the deceased why he had punched him. A fist-fight broke out between the two. The appellant said that when the deceased grabbed a parang and another sharp weapon he ran to his room to get a knife and they continued fighting. The appellant said that he was assaulted not only by the deceased but also PW12 resulting in his suffering multiple injuries. The appellant said he was forced to defend himself against his two assailants. The appellant said until that day his relationship with the deceased and PW12 had been cordial and that he never intended, or had any reason or motive, to kill the deceased. In his instant appeal against conviction and sentence on both charges, the prosecution, *inter alia*, called for the defence of provocation to be rejected as it was never put to the prosecution's witnesses during the trial.

Held (allowing appeal against murder charge, convicting appellant on lesser charge of culpable homicide not amounting to murder and sentencing him to 18 years' jail and affirming conviction and sentence in respect of charge of voluntarily causing hurt to PW12)
Per Mohd Zawawi Salleh JCA delivering the judgment of the court:

(1) In considering whether the appellant was provoked to lose his self-control, the court was entitled to consider not only the immediate act that caused the death but all relevant circumstances that preceded or surrounded that act. The nature of the alleged provocation, the manner in which the appellant reacted, the time that elapsed between the provocation and his response, previous relationship between the parties and the appellant's sensitivity or otherwise were relevant considerations in answering the subjective question on provocation. (para 39)

A **(2)** There was no reason to reject the appellant's evidence that the deceased initiated the provocation by first insulting and then punching him. The insulting words must not be looked at in isolation from the deceased's subsequent conduct when he challenged, punched the appellant again and reached for
B the parang. The insulting words served as the setting for the triggering of the second incident. Any reasonable man in the above situation would have been provoked and would have been deprived of the power of self-control. The fact there were 28 injuries on the deceased did not adversely affect the
C appellant because a reaction to provocation necessarily involved a lack of ability to exercise restraint or to judge a situation with insight and balance. (paras 41 & 50)

(3) Although the appellant should have put his defence of
D provocation to the prosecution's witnesses, it was not an inflexible rule that he should have done so, more so in a criminal case where greater latitude should be allowed. In the instant case, the appellant had challenged the prosecution's version and had put his case generally to PW12. (paras 41 &
E 42)

(4) PW12's testimony ought to have been treated with caution. However, the trial judge's judgment was barren of any discussion on that issue. PW12 was an interested witness and
F inimically disposed in favour of the deceased. The trial judge should have analysed and cautiously weighed her evidence and made a specific finding whether her evidence was tainted in any way or whether it rested upon any basis of fact. (paras 43 & 45)

G **(5)** There was no reason for the appellant to have attacked the deceased unless it was done while he was smarting under grave and sudden provocation. There was no previous animosity between the appellant and the deceased and no suggestion that he had any motive to commit the murder. His
H relationship with the deceased and with PW12 had been cordial and the crime was not committed with premeditation. (para 48)

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(6) The prosecution was not obliged in all cases and in all circumstances to explain the injuries on an accused person. It was for the accused to question the prosecution witnesses regarding the injuries he suffered. If he did not do so, such as in the present case, the prosecution's witnesses had no occasion to explain the accused's injuries. The prosecution's failure to tender the appellant's medical report, therefore, did not affect its case. The defence of self-defence, accordingly, failed. (paras 60, 61 & 62)

(7) The appeal against conviction and sentence on the second charge was without merit as there was sufficient evidence to establish that the appellant had attacked PW12 with the knife. (paras 63 & 64)

Bahasa Malaysia *Translation Of Headnotes*

Perayu disabitkan dan dijatuhkan hukuman mati oleh Mahkamah Tinggi kerana membunuh seorang lelaki ('si mati') semasa satu pergaduhan. Dia dijatuhkan hukuman penjara enam bulan atas satu lagi pertuduhan iaitu secara sengaja menyebabkan kecederaan kepada isteri si mati ('PW12') dengan menggunakan senjata berbahaya. Keterangan pihak pendakwaan sebahagian besarnya bersandarkan pada testimoni PW12. Menurutnya, selepas dia dan si mati mandi dan berada di dalam bilik mereka, perayu tiba-tiba memasuki bilik tersebut dan berulang kali menikam si mati, yang tidak bersenjata, dengan dua bilah pisau. PW12 menyatakan bahawa dia cuba mencapai telefon bimbitnya tetapi perayu telah menikam tangannya dan apabila dia berlari ke dapur untuk mendapatkan tukul, perayu mengekorinya dan menikam pahanya. PW12 terjatuh dan menjerit. Setelah bersenjatakan parang, si mati cuba menolong tetapi dia rebah. Si mati mempunyai 28 kecederaan pada badannya tetapi luka tikaman yang menembusi hatinya telah menyebabkan kematiannya. Pembelaan perayu adalah provokasi dan pertahanan diri. Menurutnya, dia berada di dalam bilik air apabila si mati menyuruhnya agar segera kerana dia juga ingin mandi. Setelah perayu memberitahunya agar bersabar, si mati menghinanya dengan memanggilnya anjing and apabila ditanya akan sebab penghinaan tersebut, si mati menumbuk muka perayu. Perayu mengatakan bahawa pada mulanya dia pulang semula ke biliknya tetapi selepas itu dia bertanyakan kepada si mati mengapa

si mati menumbuknya. Satu pergaduhan bertumbuk berlaku antara keduanya. Perayu menyatakan bahawa apabila si mati mengambil parang dan satu lagi senjata tajam, dia berlari ke biliknya untuk mendapatkan pisau dan mereka terus berlawan. Perayu menyatakan bahawa dia bukan sahaja diserang oleh si mati tetapi juga PW12 hingga menyebabkan dia mengalami beberapa kecederaan. Perayu menyatakan seterusnya bahawa dia terpaksa mempertahankan dirinya daripada dua orang penyerangnya. Perayu menyatakan lagi bahawa hingga ke hari itu, hubungannya dengan si mati dan PW12 adalah mesra dan dia tidak pernah berniat, mahupun mempunyai sebab atau motif, untuk membunuh si mati. Dalam rayuannya terhadap sabitan dan hukuman bagi kedua-dua pertuduhan, pihak pendakwaan, antara lain, mendalihkan agar pembelaan provokasi ditolak kerana ia tidak pernah diajukan kepada saksi-saksi pendakwaan semasa perbicaraan.

Diputuskan (membenarkan rayuan bagi pertuduhan membunuh, menyabitkan perayu bagi pertuduhan lebih ringan iaitu kesalahan mematikan orang dengan salah yang tidak terjumlah kepada kesalahan membunuh orang dan menjatuhkan hukuman 18 tahun penjara ke atasnya dan mengekalkan sabitan dan hukuman bagi pertuduhan secara sengaja menyebabkan kecederaan kepada PW12)

Oleh Mohd Zawawi Salleh HMR menyampaikan penghakiman mahkamah:

(1) Dalam mempertimbangkan sama ada perayu telah diprovokasi hingga hilang kawalan diri, mahkamah berhak mempertimbangkan bukan sahaja tindakan serta-merta yang menyebabkan kematian tetapi kesemua hal keadaan relevan sebelum atau yang mempengaruhi tindakan tersebut. Sifat provokasi yang didakwa tersebut, cara yang mana perayu bertindak, jarak masa antara provokasi dan tindak balasnya, hubungan antara pihak-pihak sebelum ini dan tahap sensitiviti perayu atau sebaliknya adalah relevan dalam pertimbangan untuk menjawab soalan-soalan subjektif mengenai provokasi.

(2) Tiada sebab untuk menolak keterangan perayu bahawa si mati yang memulakan provokasi dengan menghinanya terlebih dahulu dan kemudian menumbuknya. Perkataan-perkataan menghina tidak seharusnya dilihat berasingan daripada tindakan

susulan si mati semasa dia mencabar, menumbuk perayu dan mencapai parang. Kata-kata yang menghina tersebut bertindak sebagai keadaan yang menyebabkan insiden kedua. Mana-mana orang yang munasabah dalam keadaan sedemikian akan diprovokasi dan akan terhalang daripada keupayaan untuk mengawal diri. Fakta bahawa terdapat 28 kecederaan pada si mati tidak menjejaskan perayu kerana reaksi provokasi tersebut melibatkan ketidakupayaan menyekat atau menimbangkan satu-satu situasi dengan bijak dan seimbang.

(3) Walaupun perayu sepatutnya mengemukakan hujahan provokasi kepada saksi-saksi pendakwaan, ia bukanlah peraturan yang tidak boleh diubah bahawa dia sepatutnya berbuat sedemikian, khasnya dalam kes jenayah yang mana kebebasan yang lebih luas harus dibenarkan. Dalam kes ini, perayu mencabar versi pihak pendakwaan dan mengemukakan kes secara amnya kepada PW12.

(4) Testimoni PW12 sewajarnya ditimbangkan dengan berhati-hati. Walau bagaimanapun, penghakiman hakim bicara ketandusan perbincangan mengenai isu tersebut. PW12 adalah saksi berkepentingan dan memberikan keterangan bertentangan yang memihak kepada si mati. Hakim bicara sewajarnya menganalisa dan mempertimbangkan keterangannya dengan berhati-hati dan membuat dapatan khusus sama ada keterangannya tercemar dalam apa jua cara atau sama ada ia berpaut pada apa jua asas fakta.

(5) Tiada alasan untuk perayu menyerang si mati kecuali ia dilakukan semasa dia bertindak atas bangkitan marah besar dan mengejut. Tiada permusuhan sebelum ini antara perayu dengan si mati dan tiada juga cadangan bahawa dia mempunyai motif untuk melakukan pembunuhan tersebut. Hubungannya dengan si mati dan PW12 mesra dan jenayah tersebut tidak dilakukan dengan perancangan terlebih dahulu.

(6) Pihak pendakwaan tidak berkewajipan dalam kesemua kes dan dalam kesemua hal keadaan kes untuk menerangkan mengenai kecederaan pada seseorang tertuduh. Adalah tanggungjawab tertuduh untuk menyoal saksi-saksi pendakwaan mengenai kecederaan yang dialaminya. Jika dia tidak berbuat sedemikian, seperti dalam kes ini, saksi pihak pendakwaan tidak mempunyai

A peluang untuk menjelaskan kecederaan-kecederaan tertuduh. Kegagalan pihak pendakwaan untuk mengemukakan laporan kesihatan perayu, dengan itu, tidak menjejaskan kesnya. Pembelaan pertahanan diri sewajarnya gagal.

B (7) Rayuan terhadap sabitan dan hukuman bagi pertuduhan kedua adalah tidak bermerit kerana terdapat keterangan yang cukup untuk membuktikan bahawa perayu telah menyerang PW12 dengan pisau.

Case(s) referred to:

C *Brown v. State 256 US 335 (1921)* ***(refd)***
Budhi Singh v. State of HP 2013 AIR SCW 457 ***(refd)***
Dato' Seri Anwar Ibrahim v. PP & Another Appeal [2004] 3 CLJ 737 FC ***(refd)***
Magendran Mohan v. PP [2011] 1 CLJ 805 FC ***(refd)***
D *Mahmood v. State AIR 1961 All 538* ***(refd)***
McGregor [1962] NZLR 1069 ***(refd)***
Megat Halim Megat Omar v. PP [2009] 1 CLJ 154 CA ***(refd)***
PP lwn. Abdul Halim Ishak & Satu Lagi [2013] 9 CLJ 559 CA ***(refd)***
PP v. Abdul Razak Dalek [2006] 4 CLJ 129 (HC) ***(refd)***
PP v. Chee Cheong Hin Constance [2006] 2 SLR 24 ***(refd)***
E *PP v. Lasakke [1963] 1 LNS 95 HC* ***(refd)***
R v. Ahluwalia [1992] 4 All ER 889 ***(refd)***
R v. Duffy [1949] 1 All ER 932 ***(refd)***
Raju @ Balachandran and Ors v. State of Tamil Nadu AIR 2013 SC 983 ***(refd)***
F *Ramlagan Singh v. State of Bihar [1973] 3 SCC 881* ***(refd)***
SS Mujebur Rahman Mohd Sultan v. PP [2012] 1 LNS 1301 CA ***(refd)***
Tai Chai Keh v. PP [1948] 1 LNS 122 CA ***(refd)***
Tan Chor Jin v. PP [2008] 4 SLR (R) 306 ***(refd)***
Wong Swee Chin v. PP [1980] 1 LNS 138 FC ***(refd)***

G **Legislation referred to:**
Evidence Act 1950, s. 105
Penal Code, ss. 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 300, 302, 304(a), 324

Other source(s) referred to:

H *Criminal Law in Malaysia and Singapore*, 2nd edn, LexisNexis, 2012, pp 805-806
Dr Hari Singh Gour's Penal Law of India, Vol 3, (Law Publishers (India) Pt Ltd, 11th edn Revised, 2011), p 2498
Phipson on Evidence, 10th edn, para 1542

I

For the appellant - Ranbir Singh Sangha; M/s Ranbir S Sangha & Co; Advocs
For the respondent - Yaacub Chik; DPP

[Appeal from High Court, Sibu; Criminal Trial No: 45-7-2010(SC)]

Reported by Ashok Kumar

JUDGMENT

Mohd Zawawi Salleh JCA:

Introduction

[1] The appellant, Rikky Purba, was charged with (i) murdering one Vincent Anak Sabang, an offence in contravention to s. 302 of the Penal Code ("PC") and (ii) voluntarily causing hurt by dangerous weapon to Jata anak Masam, an offence in contravention to s. 324 of Penal Code.

[2] After a full trial, the learned trial judge convicted the appellant on both charges and sentenced him for the first charge to death and the second charge to six months of imprisonment with effect from the date of arrest (15 September 2008).

[3] Aggrieved by the impugned conviction and sentence, the appellant has now appealed to this court.

[4] We have heard learned counsel for the appellant and learned Deputy Public Prosecutor at length and have carefully gone through the evidence on record. We partly allowed the appeal. We reduced the first charge against the appellant from one of murder under s. 302 of the Penal Code to culpable homicide not amounting to murder under s. 304(a) of the Penal Code and sentenced him to 18 years of imprisonment which effect from the date of arrest. In so far as the second charge in concerned, we dismissed the appeal for lack of merit and we affirmed the conviction and sentence imposed by the learned trial judge.

[5] We now give our reasons.

Facts Of The Case

[6] The factual *matrix* of this case has been set out in detail by the learned trial judge. We need not, therefore, recapitulate them except to the extent it is necessary to do so for the disposal of this appeal.

[7] The prosecution placed primary reliance on the evidence of PW12 (Jata Anak Masam), who witnessed the incident that culminated in the death of her husband, Vincent Anak Sabang ("deceased"). According to PW12, on 15 September 2008, at 9.30am, she and the deceased were taking bath at their rented premise. After that, both of them went back to their own room. Suddenly, the appellant entered the room and stabbed the deceased repeatedly with two knives (exhs. PE6A and PE10A). According to PW12, at this point in time, the deceased was unarmed and did not use any weapon to defend himself. The deceased screamed for help. PW12 tried to get hold of handphone inside the drawer of a tv cabinet inside the room but the appellant stabbed her on her right hand three times.

[8] PW12 then ran to the kitchen. In the kitchen, PW12 tried to get the hammer (exh. P3). She managed to get hammer but the appellant suddenly came and stabbed on her left thigh, with a knife which was to the same knife used to attack the deceased. When she was attacked by the appellant, she fell down and lie on the floor asking for help from the deceased. The deceased came to help her. He came from the room and wielding a parang (exh. PE4). The deceased was naked and his body was covered with blood. The deceased tried to help her but he fell down.

[9] The appellant then ran to the veranda. PW12 went to the room to take the phone and called her sister, PW13 (Bunga), for help. Subsequently, PW13 and ambulance arrived to bring PW12 and the deceased to the hospital.

[10] PW14 (ASP Yeoh Chun Shyan), the investigating officer, arrived at the crime scene on the same day at about 10.20am. He saw PW12 lying down in front of the premises. He also saw the deceased lying down at the hall of the premised. At the back of the premise, on the top of the balcony, he saw the appellant lying down. One the same day about 11.20am, the medical officer confirmed the death of the deceased.

[11] PW15 (Dr A Savior Selva Sureh) had on 17 September 2008 conducted a post mortem on the deceased. The external examination of the deceased's body revealed 28 injuries which he believed were caused by sharp object such as exhs. P4A, PE6A and PE10A. The fatal injury was injury No. 6 which was a stab wound that pierces the heart.

[12] The detail result of internal examination is as follows:

A	**Head, Neck & Central Nervous System**	
–	Scalp	Left temporalis muscle found contused
–	Skull	Intact
–	Brain/spinal cord	Sub arachnoid haemorrhage seen over left posterior parietal
–	Other	O/D – Injury No. 1 – Stab pass through the right side of the neck structures which made a puncture at right external jugular vein with surrounding contusion and haemorrhage.
B	**Cardiovascular System**	
–	Pericardium	Slit by a stab over the pericardial sac seen over the apex. Pericardial sac filled with clotted and fluid blood.
–	Heart	1 x 0.2 x chamber deep stab over the apex, which enters in to left ventricle.
–	Other	(Injury to the pericardium and heart are the extension of injury No. 6)
C	**Thorax & Respiratory System**	
–	Oesophagus /Trachea	No abnormalities detected
–	Pleura & Pleural cavity	2.5 litres of fluid and clotted blood seen in the thoracic cavity.
–	Ribs	O/D – Injury No. 6 – Stab passes through the 7th inter-costal space of left side chest at its medial clavicular line.
–	Right/Left-Lung	C/S – Pale

D	**Abdomen/Gastro intestinal system/Peritoneal cavity**	
–	Stomach/ content	50ml milky fluid diet
–	Liver/spleen	C/S – Pale
E	**Genito – Urinary System, Pelvic Cavity**	
–	Right/Left – Kidney	C/S – Pale
–	Urinary bladder	Empty
F	**The Cause of Death:**	
–	Stab injury to the heart by a sharp cutting weapon.	

[13] After subjecting the prosecution's evidence to a maximum evaluation, the learned trial judge was satisfied that the prosecution had succeeded in establishing a *prima facie* case of the two charges preferred against the appellant. The appellant was called to enter his defence.

[14] The appellant elected to give evidence under oath. He presented a different story. According to the appellant, on the morning in question, a misunderstanding arose between him and the deceased. It started with the appellant taking two buckets of the water from the bath room. The deceased came suddenly and hurried the appellant to finish fast as the deceased also wanted to take bath. According to the appellant, the deceased did provoke him by uttering some insulting words, punched him on the face and after that the appellant went to his room and few minutes later he went back to ask the deceased why he punched him. The deceased replied "Jadi kamu tidak puas hati lah?".

[15] The deceased then went to take a parang and a sharp weapon. A struggle between them ensured and they punched each other. The appellant entered his room and took a knife and they fought. PW13 also assisted the deceased to assault him. The appellant said he was injured and bleeding all over his body.

[16] The appellant said that he could not remember whether he had hurt PW12 because the deceased and PW12 kept on assaulting him and he had to fight back to defend himself.

[17] According to the appellant, there was only fist fight at first. If the deceased had only insulted him and did not punch him, he would not have retaliated at all. He said, he would not have taken any weapon if the deceased has not taken a weapon first. The appellant said he had no plan to have a fight with the deceased and PW12 that morning.

[18] In nutshell, the defence of the appellant is one of provocation and self-defence.

The Appeal

[19] In the petition of appeal, the appellant raised a number of issues to challenge the learned trial judge's judgment. However, in our view, the determinative issue that called for our determination in this appeal is simply this: whether in the facts and circumstances of this case the appellant has been rightly convicted under s. 302 of the Penal Code, and if not, whether the act attributed to him would constitute a lesser offence of culpable homicide not amounting to murder punishable under s. 304(a) of the Penal Code.

Grave And Sudden Provocation

[20] Learned counsel for the appellant submitted that even if we were to give full faith and credence to the prosecution evidence, an offence under s. 302 of the Penal Code is not made out and the appellant can at best, be punished only for an offence unders. 304(a) of the Penal Code. The contention is that the appellant had no intention to kill the deceased. It was not a case of premeditated murder. Learned counsel emphasised that there was no motive on the part of the appellant to harm, injure or kill the deceased. It was argued that the act of the appellant in stabbing the deceased was committed as a result of sudden and grave provocation. In substance, it was argued that the act of the appellant would fall under Exception 1 to s. 300 of Penal Code.

[21] On the contrary, learned Deputy Public Prosecutor supporting the impugned judgment, submitted that the learned trial judge had carefully and property analysed all the evidence presented before the court and rejected the defence raised by the appellant that the incident in question took place as a result of grave and sudden provocation. Learned Deputy Public Prosecutor further contended that the findings of the learned trial judge were based on essentially question of fact and he urged this court not to disturb the said finding.

[22] We shall first advert to some general principles of law governing grave and sudden provocation. The defence of provocation is contained in Exception 1 to s. 300 of the Penal Code. It reads as follows:

> Exception 1 – Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation, or causes the death of any other person by mistake or accident.
>
> The above exception is subject to the following *provisos*:
>
> (a) that the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person;
>
> (b) that the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant;
>
> (c) that the provocation is not given by anything done in the lawful exercise of the right of private defence.
>
> Explanation – Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder, is a question of fact.

[23] 'Provocation' has not been defined in the Penal Code. The common law definition of provocation is best expressed by the classic direction of Delvin J in *R v. Duffy* [1949] 1 All ER 932:

> Provocation is some act, or series of acts done (or words spoken) ... which would cause in any reasonable person and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of himself.

[24] Provocation operates as a partial defence to murder aimed at the reduction of that crime to the lesser offence of culpable homicide not amounting to murder. For a defence of provocation to succeed, the court must be satisfied that the accused was deprived of his or her self – control at the time of killing (the subjective test) and that this was the result of wrongful conduct serious enough to provoke a reasonable person (the objective test).

[25] Provocations may vary from the less serious cases (eg, verbal provocations) to those involving very serious wrong doings (eg, provocation involving physical violence). Provocations involving different forms and degrees of wrongdoing may equally support a partial defence to murder, provided that the requirement of loss of self-control is also satisfied.

[26] In *Budhi Singh v. State of HP* 2013 AIR SCW 457, the Supreme Court of India had this to say:

> 13. The doctrine of sudden and grave provocation is incapable of rigid construction leading to or stating any principle of universal application. This will always have to depend on the facts of a given case. While applying this principle, the primary obligation of the Court is to examine from the point of view of a person of reasonable prudence if there was such grave and sudden provocation so as to reasonably conclude that it was possible to commit the offence of culpable homicide, and as per the facts, was not a culpable homicide amounting to murder. An offence resulting from grave and sudden provocation would normally mean that a person placed in such circumstances could lose self-control but only temporarily and that too, in proximity to the time of provocation. The provocation could be an act or series of acts done by the deceased to the accused resulting in inflicting of injury.

[27] Thus, no straitjacket formula can be evolved to categorise what acts may amount to provocation much less grave and sudden provocation.

[28] What would amount to "grave and sudden provocation" will depend on the facts of each case. *Dr Hari Singh Gour's Penal Law of India*, vol 3 (Law Publishers (India) Pt Ltd, 11th edn Revised, 2011), declares "sudden" as follows (at p. 2498):

A What it is said that the provocation must be "sudden" it is implied that it should have all immediately preceded the homicide in point of time. A person may repeated or continuous provocation arouse another to state of mind when the provocation immediately preceding the act is only the last straw.

B **[29]** In *Mahmood v. State* AIR 1961 All 538, Oak J had noted (at pp. 538-539):

Whether the provocation was sudden or not does not present much difficulty. The word 'sudden' involves two elements. Firstly,
C the provocation must be unexpected. If an accused plans in advance to receive a provocation in order to justify the subsequent homicide, the provocation cannot be said to be sudden. Secondly, the interval between the provocation and the homicide should be brief. If a man giving the provocation is killed within a minute after the provocation, it is a case of sudden provocation. If the
D man is killed six hours after the provocation, it is not a case of sudden provocation.

[30] With this principles in minds, we will proceed to consider whether in the circumstance of this case, the appellant can rely
E on the defence of sudden and grave provocation. The most material allegation by the appellant to be considered is the utterance of highly abusive and filthy words by the deceased. At p. 128 of AR, the appellant testified as follows:

F At first I took 2 buckets of water from the bath room that morning. Suddenly my neighbour came and told me that he wanted to take bath. He said "laju, laju". After that he said that I said "sabar dulu lah. Saya belum lagi selesai.

[31] Continuing his narration of the event at page 129 of AR,
G the appellant said as follows:

He said "Dasar uduk kamu"

Translated to mean "You are a dog".

H "I said to him why you said that. He said what do you want and he straight away punched my face."

"How many times he punched you?"

"Once only".

I "What happened next?"

"I went to my room and sat there for a while. Then I went and asked him why he punched me". A

"Did he answer you?"

"He said "jadi kamu tidak puas hati lah?"

"Then we struggled. He punched me and I punched back. Then he took parang and a sharp weapon. Then I entered my room and took a knife and we fought. B

[32] The critical issue to be determined here is whether there was time elapsed between the provocation and the act which caused death. The learned trial judge held that the appellant himself admitted that he could have tolerated and would not retaliate if the deceased only insulted him that morning and did not punch him. C

[33] The learned trial judge further held that by this admission, it is clear that even assuming the deceased uttered the alleged insulting words to the appellant, the latter was not deprived of the power of self-control. Hence, the defence of provocation does not come within the Exception 1 to s. 300 of the Penal Code. D E

[34] In assailing the impugned judgment, learned counsel for the appellant submitted that the learned trial judge erred in holding that when the appellant stabbed the deceased, the passion of the appellant had cooled and he had regained his self-control. Granted that the appellant could have tolerated the initial provocation ("insulting words") by the deceased but that was not the end of the matter. The subsequent conduct of the deceased in challenging and punching the appellant again and in reaching to the parang was the last straw that broke the camel's back in depriving the appellant of his self-control. Therefore, it was the contention of the learned counsel that the appellant's act bore a reasonable relationship to sudden and grave provocation which would attract Exception 1 to s. 300 of the Penal Code. Learned counsel further submitted that the state of mind of the appellant, having regard to the earlier conduct of the deceased, should be taken into consideration in determining whether the subsequent act would be sufficient provocation to bring the case within the exception. According to learned counsel, cumulative or sustained provocation has been recognised as one of the exceptions to s. 300 of the Penal Code. F G H I

[35] The learned Deputy Public Prosecutor defended the findings of the learned trial judge and contending that the allegation of the provocation is 'a ring of afterthought'. The nature of the provocation and the provocative words were never put to the prosecution witnesses. Further, there was no such thing as series of provocation to be accumulated and therefore amount to grave and sudden provocation. (See: *PP v. Abdul Razak Dalek* [2006] 4 CLJ 129 (HC)).

[36] Now, the concept of cumulative provocation has been recognized by Indian and Malaysian Courts. The learned authors of *Criminal Law in Malaysia and Singapore*, 2nd edn, LexisNexis, 2012, had this to say (at pp. 805-806):

> The Indian courts have recognised this concept of cumulative provocation ever since the inception of the Code. The early recognition of cumulative provocation is remarkable given that the English law at the time of the Code's promulgation restricted the provocative conduct to that which occurred immediately prior to the killing. The following third proposition of the Indian Supreme Court in Nanavati merely reaffirmed this longstanding position:
>
> > The mental background created by the previous act of the victim may be taken into consideration in ascertaining whether the subsequent act caused grave and sudden provocation for committing the offence.
>
> This proposition has also been applied locally, with cases of domestic killings involving a long history of physical, emotional and mental abuse comprising a common instance. For example, in the Singapore High Court case of *PP v. Sundarti Supriyanto*, the deceased had physically and emotionally abused her domestic maid for an extended period of time. The court held that this history of abuse comprised the 'mental background' of the accused which was relevant to the determination of grave provocation. Generally speaking, the judicial recognition of cumulative provocation does not replace the need for the provocative conduct to have been grave and sudden. As the Malaysian Federal Court in *Che Omar bin Mohd Akhir v. PP* put it 'Devoid of its gravity and suddenness ... a gradual and accumulated provocation is not sufficient to constitute a defence under Exception 1 to s 300 of the [Penal Code].

[37] In the case of *R v. Ahluwalia* [1992] 4 All ER 889, Lord Taylor said: A

> We accept that the subjective element in the defence of provocation would not as a matter of law be negatived simply because of the delayed reaction in such cases, provided that there was at the time of the killing a sudden and temporary loss of self-control caused by the alleged provocation. However, the longer the delay and the stronger the evidence of deliberation on the part of the defendant, the more likely it will be that the prosecution will negative provocation. B

C

[38] We agree with the proposition of law above. In our considered opinion, the law had set no limit on the duration of a man's passion. This would vary from one individual to another, and would depend on the circumstances in which the killing took place. The background circumstances, such as earlier provocations, D "could be taken into account in determining whether a subsequent comparatively trial act of provocation ... could cause slumbering fire of passion to burst into flame". (See *McGregor* [1962] NZLR 1069 at p. 1080).

E

[39] Thus, in considering the question whether the appellant was actually provoked to lose his self-control, the court is entitled to consider the immediate act that caused death as well as all relevant circumstances preceding or surrounding that act. The nature of the alleged provocation, the manner in which the appellant reacted, the time which eloped between the provocation F and the appellant's response, previous relations between parties, the sensitivity or otherwise of the appellant are relevant considerations to answering the subjective question on provocation.

[40] Another important fact to be noted is that in endeavouring G to determine whether there has been "time for his passion to cool off", a court is not required to resort to any mathematical formula or to arrive at any computation of time expressed in minutes or hour. The court must, however, conduct a careful circumstances of the case before it. In doing so, the court must seek to H establish whether at the time of doing the act which caused death the passion of the accused had cooled off.

I

[41] Coming back to the case at hand, we see no reason to reject the evidence of the appellant that the deceased was the one who initiated the provocation by insulting the appellant and then punched him. Generally speaking, we agree with the submission of learned Deputy Public Prosecutor that the appellant should have put his defence to the prosecution witnesses. (See *Megat Halim Megat Omar v. PP* [2009] 1 CLJ 154; *Wong Swee Chin v. PP* [1980] 1 LNS 138; [1981] 1 MLJ 212). However, this is not inflexible rules even in civil cases, and more so in a criminal case where greater latitude should usually be allowed. *Phipson on Evidence*, 10th edn at para. 1542 stated as follow:

> ... Failure to cross examine, however, will not always amount to an acceptable of the witness's testimony, e.g. if the witness had notice to the contrary beforehand, or the story is itself of an incredible or romancing character, or the abstention arises from mere motives of delicacy ... or when counsel indicates that he is merely abstaining for convenience e.g. to same time. And where several witnesses are called to the same point it is not always necessary to cross-examine them at all.

[42] In this instant case, even though learned counsel for the appellant may not have put the appellant's case specifically to PW12 or prosecution's witnesses during the trial, but he did challenge the prosecution's version and put the appellant's case generally to PW12. (See pp. 76-77 of AR).

[43] It is pertinent to note that the sole eye-witness in this case is PW12, the wife of the deceased and she herself had been involved in the fight where she suffered injuries which is the subject matter of the second charge. Therefore, her evidence ought to be treated with caution. In *Magendran Mohan v. PP* [2011] 1 CLJ 805; the Federal Court had this to say:

> It is clear to us that from her testimony she was an interested witness with a grudge against the appellant and had a purpose of her own to serve. In our judgment her evidence must be treated with caution and requires corroboration.

[44] The Indian Supreme Court in *Raju @ Balachandran and Ors v. State of Tamil Nadu* AIR 2013 SC 983 broadly identified four categories of witnesses as follows:

> 33. For the time being, we are concerned with four categories of witnesses - a third party disinterested and unrelated witness (such as a bystander or passer-by); a third party interested witness (such as a trap witness); a related and therefore an

> interested witness (such as the wife of the victim) having an interest in seeing that the accused is punished; a related and therefore an interested witness (such as the wife or brother of the victim) having an interest in seeing the accused punished and also having some enmity with the accused. But, more than the categorization of a witness, the issue really is one of appreciation of the evidence of a witness. *A court should examine the evidence of a related and interested witness having an interest in seeing the accused punished and also having some enmity with the accused with greater care and caution than the evidence of a third party disinterested and unrelated witness. This is all that is expected and required.* (emphasis added).

[45] We have considered carefully the learned trial judge's judgment and we found the judgment was barren of any discussion of this issue. The learned trial judge should have analysed and weighed cautiously the evidence of PW12, who was an interested witness and was inimically disposed towards the deceased and made a specific finding whether her evidence was coloured or tainted in any way or did rest upon any basis of fact having regard to all circumstances of this case.

[46] We agree with the submission of the learned counsel for the appellant that the story of the appellant must be accepted by the court. Based on the evidence, it was fair to infer that the subsequent conduct of the deceased in challenging, punching him again and in reaching for the parang had caused the appellant to lose his self-control. We are of the considered opinion that in the situation in which the appellant was confronted with, any reasonable man will do the same act which the appellant did.

[47] It is an established principle of criminal jurisprudence that the defence is not required to prove its case with the same rigour as the prosecution and the defence is only required to prove its case on the balance of probabilities to entitle him to rely on any general exceptions of the PC (see s. 105 of the Evidence Act 1950). It is also trite that a scenario which favours the accused should be preferred in cases where multiple inferences may be drawn from the same set of facts (See *Tai Chai Keh v. PP* [1948] 1 LNS 122; [1948] MLJ Supp 105 at p. 108 and *PP v. Chee Cheong Hin Constance* [2006] 2 SLR 24 at p. 85).

[48] There was neither rhyme nor reason for the appellant to attack the deceased unless it was done while he was smarting under grave and sudden provocation. An important aspect to be noted here is there was no previous animosity between the appellant and the deceased. The relations between the appellant and the deceased were cordial. PW12, the wife of the deceased, portrayed a cordial and good relationship between herself and the deceased on one hand and the appellant on the other hand for over a period of four years. It is clear that the appellant had not committed the crime with any premeditation. There was no suggestion that the appellant had any enmity or motive to commit any offence against the deceased, leave alone a serious offence like murder.

[49] In the case of *PP v. Lasakke* [1963] 1 LNS 95; [1964] MLJ 56, it was held as follows:

> On 8 June 1963, the accused killed the deceased with a parang. Prior to this, the deceased tried to have intercourse with the accused's wife. The accused was told of this but said nothing. The deceased told the wife that he wanted to marry her and threatened that if her husband would not divorce her he would kill him to achieve his purpose.
>
> On 8 June 1963, the deceased met the accused and said: 'Eh? Have you divorced your wife yet?' Later the deceased again taunted the accused with these words: 'Eh, are you not ashamed? Don't you realize all your friends know I have interfered with your wife? Why don't you divorce her?' The accused did nothing but tears of shame came into his eyes. Later on the deceased struck the accused on the head. There was a commotion as a result of which the deceased was killed.
>
> Held: the series of grave provocations deprived the accused of his power of self-control and the final provocation, having regard to all the circumstances of the case, was sufficiently grave and sudden to prevent the offence from amounting to murder.

[50] In our considered opinion, the insulting words ("You are a dog") must not be looked in isolation from the subsequent conduct of the deceased when he challenged, punched the appellant again and reached for the parang. The insulting words served as the setting for the triggering of the second incident. Any reasonable man in the above situation would be provoked and would be deprived of the power of self-control. The fact that

there were 28 injuries sustained by the deceased does not in our considered opinion affect the matter adversely to the appellant because a reaction to provocation necessarily involves a lack of ability to exercise restraint or to judge a situation with insight and balance. As said by Homes J in *Brown v. State* 256 US 335 (1921):

> Detached reflection cannot be demanded in the presence of an uplifted knife.

[51] In the result, on the ground of sudden and grave provocation, we allowed the appeal but only to the extent that instead of a conviction under s. 302 of the Penal Code, the appellant shall stand convicted for the offence of culpable homicide not amounting to murder punishable under s. 304(a) of the Penal Code.

Sentence

[52] As is customary in our courts particularly in cases as tragic as this one, the role of defence counsel is significantly reduced to persuading the court to temper justice with mercy. Learned counsel for the appellant did not deviate from that role. Learned defence counsel submitted that the appellant was caused to lose self-control by the thing said or done by the deceased. The appellant's loss of control is reasonable in all the circumstances, even bearing in mind that people are expected to exercise reasonable control over their emotions. The appellant was remorseful. Had the prosecution reduced the charge to a lesser offence from the beginning, the appellant would have pleaded guilty. The appellant is an Indonesian national. He will be deported to Indonesia after serving sentence; so he is not a potential threat to the Malaysian society. The appellant is not an educated man. He is still single and worked in tongkang to support his siblings in Indonesia.

[53] Learned Deputy Public Prosecutor urged the court to impose a deterrent sentence as the offence was a serious one and a life has been lost. The appellant or his counsel did not make any representation to Attorney General Chambers and sought to reduce the charge.

[54] Now, the criminal law adheres in general to the principle of proportionality in prescribing liability according to the culpability of each kind of criminal conduct. Proportion between crime and punishment remain an important consideration in the determination of sentence. The practice of punishing all serious crimes with equal severity is not known to civilized society. (See *PP lwn. Abdul Halim Ishak & Satu Lagi* [2013] 9 CLJ 559).

[55] After giving due consideration to the facts and circumstances of this case, we are of the considered opinion that the end of justice would be served if the appellant is sentenced to undergo 18 years of imprisonment with effect from the date of arrest. We take into account that the loss of life, whether intentional or not, always a serious and heinous crime, and society demands that it must be served with the appropriate sentence.

Self-Defence

[56] As we have stated earlier, the appellant also raised the defence of self-defence. Concerning this defence, we have carefully perused the record of appeal and the submissions of both counsels and found it to be totally devoid of any merit. The self-defence raised by the appellant did not fulfil the conjunctive requirements as provided under ss. 96-106 of the PC. (See *SS Mujebur Rahman Mohd Sultan v. PP* [2012] 1 LNS 1301; *Tan Chor Jin v. PP* [2008] 4 SLR (R) 306). The only issue that needs to be considered is the allegation of the failure of on the part of the prosecution to tender the medical report on the appellant during the trial.

[57] The central plank of learned counsel's submission is that the appellant had suffered serious injuries which could be gathered from the testimonies of the various witnesses called during the trial and the photograph of the appellant (exh. P8(c), p. 471, vol. 7 of AR). This fact was also supported by the evidence of PW12 when she said at page 98, line 13 to 14 of AR as follows:

> I saw Rikky Purba suffered multiple injuries too. I could not identify the injuries as he was covered with blood on his body.

[58] Learned counsel for the appellant forcefully submitted that the appellant is prejudiced by the failure on the part of the prosecution to provide the appellant with his medical report. This is because the injuries sustained by the appellant would have corroborated his version of self-defence in the High Court. The

location, length, depth and width of any stab wounds would also provide opportunities for this court to draw inferences either in support of or against the appellant's version.

[59] With respect, the submission is devoid of merit. We agree with the submission of learned Deputy Public Prosecutor that the appellant should have cross-examined PW17 (Dr Su Mee Ling) who received the appellant in Sibu Hospital on the issue of injuries sustained by the appellant. Furthermore, there is no evidence apart from the evidence of PW12 that other medical officer did receive the appellant.

[60] In our considered opinion, the prosecution is not obliged to explain the injuries on the accused in all cases and in all circumstances. It depends upon the facts and circumstances of each case. One of the important factors to be considered is whether the prosecution case becomes reasonably doubtful for its failure to explain the injuries on the accused. In the case of *Ramlagan Singh v. State of Bihar* [1973] 3 SCC 881, the court held that the prosecution is not called upon in all cases to explain the injuries received by the accused person. It is for the defence to put questions to the prosecution witnesses regarding the injuries of the accused person. When this was not done, there is no occasion for the prosecution witnesses to explain the injuries on the person of the accused.

[61] In this instant cases, the record showed that the alleged injury sustained by the appellant has not been put to the prosecution witnesses and so they had no occasion to explain the same. In such circumstances, the failure on the part of the prosecution to tender the medical report of the appellant would not affect the prosecution case, which has been accepted by the learned trial judge.

[62] Therefore, the defence of self-defence raised by the appellant must fail.

[63] As regards the second charge under s. 324 of the Penal Code, we agree with the findings of the learned trial judge that there was sufficient evidence to establish that the appellant had attacked her by stabbing her on her right hand, on her left thigh, below the arm pit and on the chest. The weapon used by the appellant was the same knife ie, PE6A that the appellant used to attack the deceased.

[64] Therefore, the appeal against the second charge is without merit.

[65] Before we conclude, we would like to say something concerning the interference of the finding of fact of the trial judge by appellate court. Generally speaking, an appellate court will not ordinarily disturb the findings of a subordinate court unless such findings are plainly wrong or there had been an insufficient judicial appreciation of the evidence before it. However, upon careful perusal of the appeal records, and after having heard the parties at great length, we are of the considered opinion that this is a case in which appellate intervention is warranted.

[66] In the case of *Dato' Seri Anwar Ibrahim v. PP & Another Appeal* [2004] 3 CLJ 737, Abdul Hamid Mohamed FCJ (as he then was) observed as follows:

> Clearly, an appellate court does not and should not put a brake and not going any further the moment it sees that the trial judge says that that is his finding of facts. It should go further and examine the evidence and the circumstances under which that finding is made to see whether, to borrow the words of H.T. Ong (CJ Malaya) in Herchun Singh's case (*supra*) "there are substantial and compelling reasons for disagreeing with the finding." Otherwise, no judgment would ever be reversed on question of fact and the provision of s. 87 CJA1964 that an appeal may lie not only on a question of law but also on a question of fact or on a question of mixed fact and law would be meaningless.
>
> (See also *Jagatheesen s/o Krishnasamy v. PP* [2006] 4 SCR 45; *PP v. Selvarajoo a/l Ramachandran* [2005] 5 MLJ 282; *P'ng Hun Sun v. Dato' Yip Yee Foo* [2013] 6 MLJ 523).

Conclusion

[67] For all the above reasons, the appeal is allowed to the extent as stated earlier.